

APPEAL NO. 021153-s
FILED JUNE 27, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 8, 2002. The hearing officer decided:

- Issue 1. The appellant (claimant) did not sustain a compensable injury on _____.
- Issue 2. The claimant did not have disability beginning December 10, 2001, and continuing through the date of the hearing because he did not sustain a compensable injury.

The hearing officer did not decide the following issues:

- Issue 3. Is the respondent self-insured (carrier) liable for the payment of accrued benefits under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3) for the period resulting from its failure to dispute or initiate the payment of benefits within seven days of the date it received notice of the injury?
- Issue 4. Was the third Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), dated May 22, 2001, based on newly discovered evidence that could not reasonably have been discovered at an earlier date, or is the self-insured's defense on compensability limited to the defense listed on the first TWCC-21, filed with the Texas Workers' Compensation Commission (Commission) on April 24, 2001?

The claimant appealed and the carrier responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

Issues 1 and 2

Due to inconsistencies in the evidence, the hearing officer decided that the claimant did not sustain a compensable injury on _____, and did not have disability because he did not sustain a compensable injury. These decisions of the hearing officer are supported by the evidence and affirmed.

Issue 3

The essential facts are undisputed.

- The carrier filed its first TWCC-21 with the Commission within seven days of receiving written notice of the claimed injury. On that TWCC-21, no information was provided in block 1. However, blocks 16 thru 23 pertaining to “INITIAL PAYMENT A-1” were completed. The following information was provided for remarks in block 23:

CLAIMANT ELECTED TO USE ACCRUED LEAVE 4-10-01 TO REMAIN ON PAYROLL. WAGE STATEMENT REQUESTED FROM EMPLOYER.

- The carrier filed a third TWCC-21 contesting compensability of the claimed injury. It was filed between the 8th and 60th day after the carrier received written notice of the claimed injury.
- There was no evidence that the carrier did not pay benefits as they became due up to the time it filed its third TWCC-21 denying the claim.
- The claimant elected to “utilize leave in lieu of workers’ compensation income benefits.”
- As a [employer] employee, the claimant is subject to Section 503.041. That section provides that an injured employee may remain on the payroll and income benefits do not accrue until the employee’s earned annual and sick leave is exhausted.¹ No income benefits would have begun to accrue until after December 10, 2001, the first day he lost time from work due to his compensable injury.

Because these facts have been established, the issue of whether the carrier is liable for benefits under Rule 124.3 is now a question of law. Based on these facts the carrier is not liable for benefits under Rule 124.3. Rule 124.3 provides in part:

- (a) Except as provided in subsection (b) of this section, upon receipt of written notice of injury as provided in §124.1 of this title (relating to Notice of Injury) the carrier shall conduct an investigation relating to the compensability of the injury, the carrier's liability for the injury, and the accrual of benefits. If the carrier believes that it is not liable for the injury or that the injury was not compensable, the carrier shall file the notice of denial of a claim (notice of denial) in the form

¹ The provisions of Rule 129.2 are substantially similar in their effect and apply to most other injured workers.

and manner required by §124.2 of this title (relating to Carrier Reporting and Notification Requirements).

- (1) If the carrier does not file a notice of denial by the seventh day after receipt of the written notice of injury, the carrier is liable for any benefits that accrue and shall initiate benefits in accordance with this title.
- (2) If the carrier files a notice of denial after the seventh day but before the 60th day after receipt of written notice of the injury, the carrier is liable for and shall pay all benefits that had accrued and were payable prior to the date the carrier filed the notice of denial and only then is it permitted to suspend payment of benefits.
- (3) If the carrier wants to deny compensability of or liability for the injury after the 60th day after it received written notice of the injury
 - (A) the carrier must establish that the evidence that it is basing its denial on could not have reasonably been discovered earlier.
 - (B) the carrier is liable for and shall pay all benefits that were payable prior to and after filing the notice of denial until the Commission has made a finding that the evidence could not have reasonably been discovered earlier.

The rule does not address the effect of the acceptance of the claim by “initiation” of benefits. However, under the 1989 Act a carrier is not liable for benefits if it begins the payment of benefits within the first seven days and then denies the claim before the 60th day. Section 409.021 provides in part:

- (a) An insurance carrier shall initiate compensation under this subtitle promptly. Not later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall:
 - (1) begin the payment of benefits as required by this subtitle; or
 - (2) notify the commission and the employee in writing of its refusal to pay and advise the employee of:

- (A) the right to request a benefit review conference; and
 - (B) the means to obtain additional information from the commission.
- (b) An insurance carrier shall notify the commission in writing of the initiation of income or death benefit payments in the manner prescribed by commission rules.
- (c) If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period.
- (d) An insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier.

Because income benefits do not accrue until the eighth day of disability, Section 408.082, and it is practically unrealistic for a carrier to receive, process, and make payment for medical care within the first seven days to pay medical benefits, carriers cannot begin the payment of benefits in many cases within seven days as required. Their only alternative is to agree to make such payments as they accrue and are due. The Commission, through Advisory 2002-08 dated June 17, 2002, has now provided a specific means for a carrier to indicate agreement to a claim with the intent to pay benefits and preserve the right to later deny the claim before the 60th day. Advisory 2002-08 provides in part:

Also, an insurance carrier may receive an acknowledgment from TWCC of the insurance carrier's agreement to pay benefits as they accrue and are due. The insurance carrier may check the appropriate box in item number 1 on a TWCC-21 form (hereinafter referred to as "cert 21s") and forward the completed form to TWCC. The form will be acknowledged as temporarily received by TWCC with a special TWCC stamp and then the form will be returned to the insurance carrier via the insurance carrier's representative's box at TWCC's Central Office. The TWCC will acknowledge and return the cert 21s received since the August 16th court decision and will return them to the insurance carrier representatives. The TWCC will not retain copies of these cert TWCC 21 forms since they are not required to be filed by Commission rules.²

² The Advisory was in response to the decisions in the Downs case. In Downs v. Continental Casualty Co., 32 S.W.3d 260 (Tex. App.-San Antonio 2000), the 4th Court of Appeals held that "a carrier waives its right to deny

The carrier filed its first TWCC-21 prior to the issuance of Advisory 2008-02. At that time there was no formal mechanism for carriers to agree to begin payment of benefits as they accrue and are due. They were left to their own devices to create a reasonable mechanism to accomplish this requirement within the seven-day period established by the 1989 Act and Commission rules. The filing of a TWCC-21 indicating agreement to pay benefits as done in this case by the carrier was a reasonable mechanism. That is clearly so considering the adoption of an almost identical mechanism established by Advisory 2002-08. In this case, the carrier, by filing its first TWCC-21, completing blocks 16 through 23, and stating in block 23, "CLAIMANT ELECTED TO USE ACCRUED LEAVE 4-10-01 TO REMAIN ON PAYROLL. WAGE STATEMENT REQUESTED FROM EMPLOYER," clearly indicated its agreement and intent to pay benefits for this claim as they accrue and are due. It thereby preserved its right to later deny the claim within the 60 days after it first received written notice.

Issue 4

We decline to decide issue 4. As indicated above, the carrier preserved its right to deny the claim within 60 days after receiving written notice of the claim. Therefore, the carrier had the right to deny liability within 60 days, even if the evidence that was the basis for the denial could have been discovered earlier. Also, the first TWCC-21, filed with the Commission on April 24, 2001, was not a denial or defense on the claim; it was an agreement and intent to pay benefits for this claim as they accrue and are due.

The hearing officer's decision that the claimant did not sustain a compensable injury and did not have disability is affirmed. The hearing officer's non-decision of issue 3 is reversed and a new decision is rendered that the carrier is not liable for benefits under Rule 124.3.

compensability if it fails to comply with section 409.021(a) of the Texas Labor Code by either agreeing to begin the payment of benefits or giving written notice of its refusal to pay within seven days after receiving written notice of an injury." That decision was affirmed by a decision not yet final, Continental Casualty Co. v. Downs, IN THE SUPREME COURT OF TEXAS, No. 00-1309.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**MANAGER
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Robert E. Lang
Appeals Panel
Manager/Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Michael B. McShane
Appeals Judge